
CASE NOTE

Chassagnou and Others v. France² European Court of Human Rights April 29, 1999

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Rights in property—particularly in land—have been described as the foundation of every other right of persons in a free society: “To the framers [of the US Constitution] identifying property with freedom meant that if you could own property, you were free. Ownership of property was protected.”³

Particularly critical in many jurisdictions is the right to exclude others. In 1936, the American Law Institute’s Restatement of the Law of Property described the possessory interest in land in terms of the right to exclude, as follows—

“A possessory interest in land exists in a person who has (a) a physical relation to the land of a kind which gives a certain degree of physical control over then land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.”⁴

One noted commentator has described the “notion of exclusive possession” as “implicit in the basic conception of private property”.⁵

Chief Justice Rehnquist of the U.S. Supreme Court is particularly vocal, having described the owner’s right to exclude others from private land as, “universally held to be a

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² Application No.s 25088/94, 28331/95 and 28443/95.

³ Norman Karlin, “Back to the Future: from Nolan to Lochner”, 17 SW U. L. Rev. 627, at 637–638 (1988); James W. Ely, Jr, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, Oxford University Press (1992) at 9; William Van Alstyne, “The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties”, 43 Law & Contemp. Probs. 66 (1980); Carol M. Rose, “Property as the Keystone Right?” 71 Notre Dame L. Rev. 329 91996); Ronald J. Krotoszynski, “Fundamental Property Rights”, 85 Geo. L. J. 555 (1997).

⁴ Restatement of Property, s.7, possessory interests in land (1936).

⁵ Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* 63 (1985).

fundamental element of the property right ... even if the Government physically invades only an easement in property, it must nonetheless pay compensation”⁶, and “one of the most essential sticks in the bundle of rights that are commonly characterised as property”.⁷ That Court later described physical intrusion as “the most serious form of invasion of an owner’s property interests. [T]he government does not take a single ‘strand’ of the bundle of property rights: it chips through the bundle, taking a slice of every strand”.⁸ The Court’s explanation for this, was expressed as follows—

“Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner’s property. As [another part of the Opinion] indicates, property law has long protected an owner’s expectation that [he] will be relatively undisturbed at least in the possession of [his] property. To require, as well, that the owner permit another to exercise compete dominion literally adds insult to injury. Furthermore, such occupation is qualitatively more severe than a regulation of the use of the property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion”.⁹

This right to exclude achieved international status with the 1999 Opinion of the European Court of Human Rights (ECtHR) in *Chassagnou and Others v. France*.¹⁰ Before the Court was the French Loi Verdeille¹¹, which provides for the statutory pooling of hunting grounds. The effects on the claimants—three farmers—was to force them to become members of a municipal hunters’ association (ACCA) and to transfer hunting rights to the association, with the result that all association members could enter their property for the purpose of hunting.¹² The three farmers belong to two anti-hunting wildlife protection associations and strenuously objected to hunters on their property against their express wishes as landowners. In particular, they alleged violation of Articles 9, 11 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), together with Article 1 of its Protocol No 1, which states that:

“Every natural or legal person is entitled to the peaceful enjoyment of [his] possessions. No one shall be deprived of [his] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”.

The Court framed the issues as follows:

“The applicants submit that the obligation for them to transfer hunting rights over their land to ACCA, against their will and without compensation or consideration, constituted an abnormal deprivation of their right to use their property, firstly in that they were obliged to tolerate the presence of hunters on their land, whereas they were opposed to hunting for ethical reasons, and secondly in that they could not use the land they owned for the creation of nature reserves where hunting was prohibited.”¹³

⁶ *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180 (1979).

⁷ *ibid.*, see also Rehnquist’s Opinion in *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

⁸ *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 435 (1982).

⁹ *ibid.*, at 436.

¹⁰ see fn.2.

¹¹ Law No. 64-696 of July 10, 1964.

¹² *ibid.*, at para. 13.

¹³ *ibid.*, at para. 72.

The government of France responded that the interference with the applicants' property rights was minor because they had not been deprived of the right to use their property and all they lost was the right to prevent other people from hunting on their land.

The Court disagreed. It began by noting that Article 1 of the Protocol, quoted above, requires that any interference with individual property rights would further require a fair balance between the demands of the general community and the protection of individual fundamental rights.¹⁴ The Court also found that it was "undoubtedly in the general interest to avoid unregulated hunting and encourage the traditional management of game stocks"¹⁵—clearly the purpose of Loi Verdeille. However, the Court found the interference with the applicants' fundamental right to peaceful enjoyment of their land "disproportionate", and expressed that opinion as follows:

"[N]otwithstanding the legitimate aims of Loi Verdeille when it was adopted, the Court considers that the result of the compulsory transfer system which it lays down has been to place the applicants in a situation which upsets the fair balance to be struck between protection of the right to property and the requirements of the general interest. Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of the Protocol. There has therefore been a violation of that provision".¹⁶

The Court also found discrimination on the ground of property within the meaning of Article 14 of the Convention, because only small landowners were required to transfer their hunting rights under the Loi Verdeille.¹⁷ In coming to the conclusion that there was also a violation of Article 11 of the ECHR, the Court said:

"To compel a person by law to join an association such that it is fundamentally contrary to [his] owners' convictions to be a member of it, and to oblige him, on account of his membership of that association, to transfer [his] rights over the land [he] owns so that the association in question can attain objectives of which [he] disapproves, goes beyond what is necessary to ensure that a fair balance is struck between conflicting interests and cannot be considered proportionate to the aim pursued."¹⁸

The holding and reasoning of the *Chassagnou* case should be compulsory reading in jurisdictions where the right to exclude is under pressure—if not outright attack. Thus, for example, courts in the U.S. State of Oregon pretend to find a "custom" for the entire population of the State to go upon dry sand beach areas anywhere in the State, citing the eighteenth-century English lawyer, William Blackstone as authority.¹⁹ Of course Blackstone in his *Commentaries* would have absolutely rejected such a perversion of custom for woeful lack of certainty—whether of the custom (too general), the place (far

¹⁴ Law No. 64-696 at July 10, 1964.

¹⁵ *ibid.*, para. 79.

¹⁶ *ibid.*, para. 85.

¹⁷ *ibid.*, para. 92-95.

¹⁸ *ibid.*, para. 117.

¹⁹ *State of Oregon ex rel Thornton v. Hay* 462 P 2d 671 (Ore 1969).

too large geographically), or the persons entitled to exercise it (far too large a class).²⁰ Custom cannot possibly serve to derogate from the common law property right to exclude in such circumstances. One contemporary (with Blackstone) judge observed—

“How that which may be claimed by all the inhabitants if England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be a custom.”²¹

Likewise in the U.S. State of Hawaii, the State’s highest court has granted native Hawaiians the right to go upon any “not fully developed” land in the State for the purposes of exercising constitutionally-protected traditional and cultural rights, without defining either such rights or what constitutes a native Hawaiian.²²

To the landowners’ complaints that such a holding would fundamentally alter its property rights—in particular the right to exclude others, the court blithely observed that such arguments “place undue reliance on Western understanding of property law that are not universally applicable in Hawaii.”

Such jurisdictions could usefully be reminded of the universal nature of property rights and the fundamental nature of the right to excluded, as ably set forth by the ECHR in *Chassagnou*, that—

“[A]n interference with property rights and the right to exclude must achieve a ‘fair balance’ between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”²⁴

²⁰ Blackstone, *Commentaries on the Laws of England 1765–1769*, at 78; cf. Also David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?* (2000) 30 E.L.R. 10003.

²¹ *Fitch v. Rawling* (1795) [1775–1892] All E.R. 571, at 574.

²² Over 200,000 people in the State—one-fifth of its population—claim some Hawaiian blood: *PASH v. Hawaii County Planning Commission* 903 p. 2D 1246 (Hawaii 1995); *Hawaii v. Hanapi* 970 P. 2d 485 (Hawaii 1998). See, Sullivan, *Traditional and Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 Haw. L. Rev. 99 (1999).

²³ *PASH*, *ibid.*

²⁴ *Chassagnou*, see fn.2, at para. 75.